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No. 73-428

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v

NORBERT NISAN KAHAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 14a–15a) was entered on May 16, 1973. On July 9, 1973, the court of appeals (three judges dissenting) denied a petition for rehearing *en banc* (App. C, *infra*, pp. 16a–17a). Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to

and including September 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant's false statements uttered in a pretrial hearing may, when relevant, be proved against him at trial.

STATEMENT

Respondent Norbert Nisan Kahan and a co-defendant, Bertha Newman, were charged in a 67-count indictment with numerous offenses arising out of a scheme to defraud nonresident aliens and the Immigration and Naturalization Service (INS).[1] Respondent was convicted after a jury trial on one count of conspiracy, seventeen counts of receiving unlawful gratuities, two counts of making false statements, and on one count of perjury.[2] Respondent was sentenced to five years' imprisonment and fined $15,000; execu-

[1] Respondent Kahan and co-defendant Newman were charged with one count of conspiracy to violate 18 U.S.C. 201(f), 201(g) and 1001, in violation of 18 U.S.C. 371. Respondent was further charged with 20 counts of receiving gratuities as an INS employee in connection with the adjudication of applications submitted to the INS, in violation of 18 U.S.C. 201(g); 3 counts of making false statements on certain INS forms, in violation of 18 U.S.C. 1001; and 2 counts of perjury before the grand jury, in violation of 18 U.S.C. 1623. Co-defendant Newman was charged with 21 counts of submitting applications to the INS containing false statements, in violation of 18 U.S.C. 1001 and 2; and 20 counts of paying gratuities to respondent, in violation of 18 U.S.C. 201(f) and 2.

[2] Co-defendant Newman was convicted of the conspiracy count, 17 counts of paying unlawful gratuities, and 18 counts of making false statements.

tion of the prison term was suspended on condition that respondent pay the fine, the bill of the Court Reporter for a daily copy of the trial which he had ordered, and his court appointed attorney's fee within 24 hours. Respondent promptly made the payments. The court of appeals reversed respondent's conviction [3] on the ground that his false statements as to his indigency, made at arraignment to obtain free counsel, were improperly admitted against him in the government's case-in-chief.

1. Respondent and his co-defendant were shown to have been involved in a scheme to secure unlawful payments from nonresident aliens in return for providing extensions of their visa permits. Co-defendant Newman would fill out aliens' extension applications—usually at her apartment—and receive a fee of $100 in excess of the normal application fee. She would then take the applications to respondent, an INS inspector, who would summarily approve them.

After the indictment was filed, respondent appeared at arraignment without an attorney and asked the court to assign counsel for him. The court questioned respondent as to his financial status in order to determine whether he was eligible for appointed counsel under the Criminal Justice Act (18 U.S.C. 3006A(b)). Respondent represented that he had "no current funds

[3] Co-defendant Newman's conviction was affirmed in all respects.

at all" and that his money was "blocked by my wife from whom I am divorced."[4] At the time he made

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[4] The transcript of the colloquy at arraignment, which was introduced at trial, reads as follows:

"The COURT. Your name, sir?

"Defendant KAHAN. I am Norbert Kohan, sir.

"The COURT. Have you an attorney?

"The DEFENDANT. No, sir.

"The COURT. Have you any money to hire an attorney?

"The DEFENDANT. I do, sir, but it is blocked by my wife from whom I am divorced.

"The COURT. Do you want a week to try and straighten that out?

"The DEFENDANT. There is a suit coming up sometime early next year.

"The COURT. We can't wait until next year.

"The DEFENDANT. Then, if it pleases the Court, I would like to have the Court assign me an attorney.

"The COURT. You have no current funds?

"The DEFENDANT. I beg your pardon?

"The COURT. You have no current funds at all?

"The DEFENDANT. No, sir.

"The COURT. Are you working?

"The DEFENDANT. No, sir.

"The COURT. I am going to assign Mr. Jesse Berman at this point.

"Mr. Berman, will you accept the assignment?

"Mr. BERMAN. Yes, your Honor.

"The COURT. All right.

"Mr. EATON. Your Honor, the government would request that the defendant be put under oath to swear to the Criminal Justice Act form and be warned—

"The COURT. That will certainly follow.* You will review that with him, I am sure, Mr. Berman.

"Mr. BERMAN. I will, your Honor.

"The COURT. And determine whether or not he meets the requirements of the Criminal Justice Act."

* * * * *

See fn. on p. 5.

these representations, respondent had approximately $27,000 in four bank accounts over which he had exclusive control.[5]

At trial the government introduced the accounts, which showed that in 1970 and 1971 respondent had deposited more than his entire adjusted income as

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(Adjourned to Second Call.) Second Call.

"Mr. BERMAN. I have conferred with the defendant about his financial status and I am satisfied that he is without means. He worked for twenty-one years until about two weeks ago for the Department of Immigration & Naturalization, and he has been suspended because of this case, so he is not employed at the present time. He has no savings account in any bank in his own name. He had a joint account with his wife but since their divorce she has control of that account. And he very strongly offers to reimburse the Government should he be successful in his lawsuit against his ex-wife for the control of that account, but at the present time he has no money.

"The COURT. Have you filled out the usual form?*

"Mr. BERMAN. No, I haven't yet.

"The COURT. Will you see that he gets that. Mr. Clerk?

"The CLERK. Yes, your Honor.

"The COURT. Submit it in due course.

"Mr. BERMAN. Surely, your Honor."

*At trial it was determined that respondent never did make these averments under oath, either orally or by presentment of written affidavit (Tr. 1384–1385).

[5] The accounts were "Totten" trusts which, under New York law, were under respondent's exclusive control and could be freely depleted by him at any time. During the period immediately subsequent to respondent's request for court appointed counsel, he did make frequent withdrawals from these accounts, including one of $5,000 (Government Exhibits 66–70). And on the very day respondent made his claim of indigency in district court, he deposited $400 in one of the accounts (Government Exhibit 69).

reported by him on his tax returns. This evidence was received as a basis for an inference that respondent had received some of the money paid to his codefendant by aliens seeking extensions of their visas. Respondent's false statements concerning his assets were likewise introduced as false exculpatory statements evincing a consciousness of guilt, and also as similar acts tending to show the willfulness of his perjury before the grand jury.

2. The court of appeals reversed respondent's conviction, holding that his false pretrial statements, made in order to secure court appointed counsel, for which he was not eligible, should not have been admitted in the government's case-in-chief. The court below ruled that respondent had been improperly forced to choose between the Fifth Amendment right to remain silent and his Sixth Amendment right to counsel. Reliance was placed on *Simmons* v. *United States*, 390 U.S. 377, and *United States* v. *Branker*, 418 F. 2d 378 (C.A. 2). The court viewed *Simmons* as precluding any distinction between false statements made to fraudulently claim a right and admissions made in the course of asserting a right: "The ultimate truth of the matter asserted in the pretrial request for appointed counsel is of no moment. See *Simmons* v. *United States*, 390 U.S. 377, 393 (1968)" (App. A, *infra*, p. 4a).

Judge Mansfield dissented. He acknowledged that an accused's self-incriminatory pretrial testimony offered to secure a Fourth Amendment or Sixth Amendment right may not be later admitted as part of the government's case-in-chief. However, in his view, *Simmons* "was founded on the principle that an ac-

cused should not be deterred from telling the truth at a pretrial hearing even though it would involve admissions of an incriminating nature" (App. A, *infra*, p. 10a). Judge Mansfield concluded, "No legitimate interest is protected by extending the rule to outright perjury or falsification. * * * It is unnecessary to grant [the accused] a license to falsify in order to protect his exercise of his pretrial constitutional rights" (App. A, *infra*, pp. 10a–11a).

REASONS FOR GRANTING THE WRIT

In banning the use at trial of respondent's false statements at arraignment, the court below declared, "The ultimate truth of the matter asserted * * * is of no moment" (App. A, *infra*, p. 4a). Such a proposition poses a distinct threat to the integrity of the judicial process. The truthfulness of testimony is a fundamental value of our legal system, and false statements or perjury cannot lightly be sanctioned. *Simmons* v. *United States*, 390 U.S. 377, in no way supports the court's decision. Since the ruling below requires the government and the courts to forego an important deterrent to false swearing, without promoting the proper exercise of constitutional rights, review by this Court is warranted.

1. In *Simmons* the Court faced a narrow problem arising from judicially created rules of standing: In order to establish standing to move to suppress the contents of a suitcase on the ground that they had been seized in violation of his Fourth Amendment rights, Garrett (Simmons' co-defendant) had to establish his

ownership of the suitcase. At the suppression hearing, he testified that the suitcase was similar to one he had owned and that he owned the clothing found in the suitcase. Since the suitcase also contained bill wrappers from the bank he was charged with robbing, his testimony was tantamount to a confession of the crime. After the suppression motion was denied, Garrett's admissions at the hearing were introduced against him at trial, and he was convicted. Garrett's dilemma, as the Court stated it, was that he "was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination" (390 U.S. at 394). Finding "it intolerable that one constitutional right should have to be surrendered in order to assert another," the Court held that Garrett's testimony at the suppression hearing could not be used against him at trial "on the issue of guilt" (*ibid.*).

Respondent alleged that he too was forced to "surrender * * * [one constitutional right] in order to assert another" (*Simmons, supra,* 390 U.S. at 394). And the court below perceived the same dilemma: "A defendant should not be forced to gamble his right to remain silent against his need for counsel * * *" (App. A, *infra,* p. 4a). But this is a false analogy, for two distinct reasons: First, respondent in fact did not face a choice between constitutional rights. Second, as we will argue (*infra,* b., p. 10), "to the extent that [*Simmons'*] rationale was based on a 'tension' between constitutional rights and the policies

behind them, the validity of that reasoning must now be regarded as open to question" (*McGautha* v. *California*, 402 U.S. 183, 212).

a. Unlike the defendant in *Simmons*, respondent was *not* "obliged either to give up what he believed * * * to be a valid [Sixth] Amendment claim or, in legal effect, to waive his Fifth Amendment privilege" (*Simmons, supra*, 390 U.S. at 394). In fact, respondent had no Sixth Amendment right to appointed counsel, since he had money to pay for one. We need not quarrel with the court of appeals' view that "[a] defendant should not be forced to gamble his right to remain silent against his need for counsel" (App. A, *infra*, p. 4a). In fact, respondent faced no "Hobson's choice" between a right to counsel and a right not to incriminate himself. His dilemma was no more than a choice between lying to get a free lawyer and paying to hire one.

In *Simmons* there was a real danger that a defendant might forego a valid Fourth Amendment claim for fear that his admissions—made to establish standing—would be used to incriminate him at trial. A rule forbidding the use at trial of admissions made at pretrial hearings encourages the making of legitimate claims and, in the Fourth Amendment context, increases the efficacy of the exclusionary rule. A rule forbidding the use at trial of false pretrial testimony would have just the opposite effect: it would encourage the making of fraudulent claims and would render constitutional safeguards less effective. Nor can such a rule be justified as a measure to protect a defendant

making a good faith claim. There is no need to lie to assert a right to which one is entitled. He who does lie, as respondent did, to secure a right to which he is *not* entitled, should bear the risk that his lie may be discovered and used against him.[6]

b. This Court has had occasion to reconsider its analysis of the problem in *Simmons* in terms of a "tension" between constitutional rights and has suggested that the *Simmons* holding is better understood as a rule to promote Fourth Amendment values. In *McGautha* v. *California,* 402 U.S. 183, the Court was faced with the asserted "dilemma" of a defendant being tried before a jury empowered to determine both the issues of guilt and penalty. His choice, it was claimed, was either to give up his right to be heard on the issue of punishment, or waive his privilege against self-incrimination. In finding this a false dilemma, the Court questioned the extent to which *Simmons* was based on Fifth Amendment policies. The Court noted that the defendant in *Simmons* had not been "compelled" to incriminate himself in any usual sense of the word. 402 U.S. at 212. The Court suggested that strengthening "the efficacy of the exclusionary rule" was "an analytically sufficient basis for decision" and

[6] In asserting that truthfulness at pretrial proceedings "is of no moment," the court below may have been of the view that if the defendant testifies truthfully at a suppression hearing he will prevail, whereas if he lies, he will lose and thus it is irrelevant whether the defendant lies or not. However, a defendant might testify truthfully as to the facts necessary to establish his standing, yet lose the motion on the merits, because the police had probable cause, did not exceed the scope of a search incident to an arrest, or a host of other reasons.

dismissed as "insubstantial * * * the purely Fifth Amendment interests involved in *Simmons.*" 402 U.S. at 211–212. The Court concluded (402 U.S. at 212–213):

> While we have no occasion to question the soundness of the result in *Simmons* and do not do so, to the extent that its rationale was based on a "tension" between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question, and it certainly cannot be given the broad thrust which is attributed to it * * * in the present case.

McGautha suggests that the claims made in *Simmons* and in the court below should not be analyzed in terms of a "tension" between the right sought to be asserted and the Fifth Amendment. Rather, the focus should be on the right asserted and reasonable means to foster its proper exercise. Stripped of its Fifth Amendment trappings, respondent's claim is very weak indeed. What conceivable Sixth Amendment interest is served by allowing a defendant to lie to fraudulently obtain free counsel, without fear that his lies may be used against him at trial?

2. In related contexts, this Court has made it clear that it will not tolerate the assertion of a constitutional right as a shield for perjury. In *Harris* v. *New York,* 401 U.S. 222, the defendant took the stand in his own defense and blithely told a story totally at odds with his post-arrest statement, which had been suppressed for lack of a proper *Miranda*[7] warning. This Court approved the use of the post-arrest state-

[7] *Miranda* v. *Arizona*, 384 U.S. 436.

ment—obtained in violation of Harris' Fifth Amendment rights—to impeach him at trial. The Court said, "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances." *Harris, supra,* 401 U.S. at 226; see also *Walder* v. *United States,* 347 U.S. 62. By the same token, we urge that "[t]he shield provided by [*Simmons*] cannot be perverted into a license to use perjury [at pretrial hearings] * * * free from the risk of confrontation [at trial] * * *."

In *United States* v. *Knox,* 396 U.S. 77, the defendant, like respondent, asked to be relieved of the consequences of making false statements on the ground that his utterances were coerced in violation of his Fifth Amendment rights. Knox, who made false statements regarding his gambling activities on an Internal Revenue Service form, defended on the ground that the law requiring the information requested on the form unconstitutionally required disclosure of incriminating statements. The crime was committed, in other words, only because the government required disclosures in violation of his privilege against self-incrimination. This claim, too, was rejected. The Court held that " * * * one who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself." 396 U.S. at 79. See also *Bryson* v. *United States,* 396 U.S. 64, 72; *Dennis* v. *United States,* 384 U.S. 855, 864–867.

In summary, we do not contest the general principle of *Simmons* that incriminating pretrial testimony, made in order to assert another constitutional claim, may not be used in the government's case-in-chief. However, we see no reason to permit an accused fraudulently to claim a right to which he is not entitled and then to preclude the government from using his lies against him during a subsequent trial. Such a rule can only encourage defendants to perjure themselves at pretrial hearings at which, for example, they are seeking free counsel, asserting claims of coerced confessions, testifying on the *merits* of a Fourth Amendment claim, or relating the details of an allegedly prejudicial line up at a *Wade*[8] hearing.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1973.

[8] *United States* v. *Wade*, 388 U.S. 218.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 706-707—September Term, 1972.

(Argued March 22, 1973 Decided May 16, 1973.)

Docket Nos. 72-2333, 73-1012

UNITED STATES OF AMERICA,

Appellee,

v.

NORBERT NISAN KAHAN and BERTHA LIMO NEWMAN,

Appellants.

B e f o r e :

SMITH, FEINBERG and MANSFIELD,

Circuit Judges.

Appeals by Norbert Kahan and Bertha Newman from a judgment of conviction in the United States District Court for the Southern District of New York for violation of 18 U.S.C. §§2, 201(f), 201(g), 1001 and 18 U.S.C. 371, conspiracy to violate these laws.

Affirmed as to appellant Newman.

Reversed as to appellant Kahan.

SMITH, *Circuit Judge:*

Norbert Kahan and Bertha Newman were convicted on trial to the jury in the Southern District of New York (Constance Baker Motley, *Judge*), of conspiracy, bribery and falsifying visa extension applications. Kahan was also convicted of perjury before the grand jury. Both appeal. Kahan challenges his conviction on grounds of (1) improper striking of character evidence, (2) failure by the jury to consider each count separately, and (3) use in the government's direct case of Kahan's statements made while requesting appointed counsel as violative of his Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. Newman contends that the government failed to establish by clear and convincing evidence an independent source for an in-court identification made subsequent to an improper showup and that the court improperly limited her impeachment of the government's witnesses. For the reasons set forth below, we reverse Kahan's conviction and affirm Newman's.

The principal charge involved a scheme to use Kahan's position as an Immigration inspector to obtain monies from non-resident aliens for improper extension of their visa permits. Aliens who in many cases could not speak English went to Newman who filled out their application papers, took $100 in excess of the normal application fee, and later returned an extended visa. Sixteen of those who had sought Newman's services testified at trial to the falsity

of Newman's entries on the applications as set forth in the margin.[1]

The evidence against Kahan was also extensive, although circumstantial.[2]

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1 They stated that Newman filled out the application, that she had not read to them, nor could they read for themselves, the answers she filled in. They further testified that certain answers as made known to them subsequently had no basis in truth nor in any information that they had given to Newman. There was evidence that Newman in fact knew that the answers were false and used answers that were required for an extension.

2 No alien testified to any dealings with Kahan. The sole direct testimony linking Kahan to Newman's scheme was Inspector Piccirillo's testimony that he had seen Newman and Kahan meet twice while he was surveilling Kahan; once on April 13, 1971 and again on April 19, 1971. At the first meeting which took place about five o'clock, the officer saw appellants meet, go into a restaurant, and Kahan depart as he took money out of an envelope and put it into his wallet. At the second meeting Piccirillo observed the entire meeting of the two which lasted about twenty minutes. There was also evidence that Newman had attempted to visit Kahan at work. When questioned by Conely, Kahan's supervisor, Newman lied to him about her purpose for visiting and slipped away.

Newman told one of the alien applicants when he asked why the fee was a hundred dollars, that she had to pay part of it to a friend in Immigration. Newman told another applicant the fee would be $140 because ". . . I have to split it with somebody there (Immigration office) and this man don't want anymore $50." While the usual procedure for filing an application took 30-45 minutes, Mrs. Newman on several occasions needed substantially less time to get the application approved by Kahan. Search of Newman's apartment, after an interview with the FBI during which she denied having prepared any more than six applications or accepting money for assistance in preparing the forms, turned up a box filled with Immigration forms and a looseleaf binder containing 178 carbon copies of I-539 forms. One hundred fifty-five of these applications had been approved by Kahan, a far higher proportion than would be expected in view of the number of inspectors passing on such forms. Kahan's supervisor had discovered that he had been adjudicating I-539's not assigned to him. A year later after having been instructed not to handle any more walk-in I-539's and not to speak to any alien, Kahan approved two more applications both prepared by Newman.

Kahan's bank statement and income tax returns indicated that Kahan had banked all but $500 of his reported income for the year 1970 and $2000 more than his reported adjusted gross income in 1971. Statements

Kahan's third claim of error raises the most substantial question. At arraignment Kahan stated that he was without assets and in need of appointed counsel. These statements were used against him on trial in the government's case in chief. Use of Kahan's false claims of lack of assets was claimed to be violative of his right against self-incrimination and right to counsel. We agree. *United States* v. *Branker*, 418 F.2d 378, 380 (2d Cir. 1969); *see McGautha* v. *California*, 402 U.S. 183, 239 (1971) (Douglas, J., dissenting). The government's claim that the privilege does not extend to false statements is not well taken. The ultimate truth of the matter asserted in the pre-trial request for appointed counsel is of no moment. *See Simmons* v. *United States*, 390 U.S. 377, 393 (1968). A defendant should not be forced to gamble his right to remain silent against his need for counsel or his understanding of the requirements for appointment of counsel.[3] Nor does the mere fact that Kahan's statements were not made under oath take them without the protection of the Fifth Amendment. Addressed by the court as to his financial assets, defendant was required to speak in order to obtain appointed counsel. *Cf. Couch* v. *United States*, —— U.S. ——, 93 S.Ct. 611, 615-16 (1973).

The government urges us to hold any error there might be in admitting Kahan's exculpatory statements harmless. We must decline. Here, as the government admits, the

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of his lack of funds made at arraignment in the context of request for appointed counsel were introduced as evidence of similar acts to the perjury charged and as false exculpatory statements evincing consciousness of guilt. Kahan at the time he made this misrepresentation had access to several Totten trusts totaling more than $25,000.

3 Here Kahan claims not to have understood that assets held in a Totten trust were his. If there has been willful misrepresentation by defendant of his assets, proper remedy lies in prosecution for perjury or false statement and the recovery from him ordered here by the court of counsel fees and expenses improperly paid on his behalf.

evidence against Kahan was entirely circumstantial. Credibility was an essential factor, especially as two counts of the indictment charged the defendant with perjury.[4] Not only did the prosecution introduce the statements in its direct case and argue them in summation, the court also focused on these statements in its instructions to the jury.[5] As there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is required. *See Schneble* v. *Florida*, 405 U.S. 427, 430-31 (1972).

Kahan's two other claims of prejudicial error are without merit. Appellant offered the testimony of one of the directors of his synagogue as to his good character; the testimony was stricken on the grounds that it was not proper character evidence and that the witness was not shown to be sufficiently acquainted with the defendant. Under the

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4 Kahan's defense was his own testimony denying the government's allegations and the testimony of a character witness.

5 "Now, the Government has tendered evidence which it claims shows acts by Mr. Kahan similar to the ones charged in the perjury count.

Mr. Kahan is not on trial for events relating to these similar acts; that is, the statements which he made to the Court at the time of his arraignment regarding his ability to secure a lawyer of his own choosing with his own funds.

You may, however, consider, in determining whether the defendant acted with guilty knowledge or unlawful attempt on the charges of perjury before you, the fact, if you find it to be true, that he engaged in other similar acts to those charged in those perjury indictments.

You are to consider that evidence as to what he said on the arraignment regarding his finances on the question of knowledge and intent only when you are considering the perjury charges made against him in this indictment.

Now, again with respect to that particular evidence, that is, the statements made by Mr. Kahan on his arraignment regarding his finances, there is another principle of law applicable here and that is that conduct of a defendant, including statements which are knowingly made by him upon being informed that a crime has been committed, or that he has been accused of a crime, may be considered by the jury in the light of all other evidence in the case."

prevailing view character evidence must be based solely on reputation in the community; it must be hearsay and cannot be based on the witness' own personal assessment of the defendant or on specific acts reflecting certain qualities. *Michelson* v. *United States*, 335 U.S. 469, 477 (1948). Here the witness stated that he had never discussed nor heard discussion of defendant's reputation as far as truth and veracity because ". . . his actions show that he was a man of truth, veracity, integrity, and I think he's one of the best liked men in the synagogue." Kahan also attempted to bring in through this witness evidence of refusal by him to help the witness through Kahan's position with the Immigration agency, evidence clearly precludable under *Michelson*. *See United States* v. *Beno*, 324 F.2d 582, 587 (2d Cir. 1963).

Prior to introducing character testimony defendant must establish the witness' acquaintance with defendant, the community and his circle of acquaintances. The court properly ruled that a witness who did not know enough about defendant to be aware of defendant's occupation lacked sufficient knowledge of defendant.[6]

Appellant's claim that the jury's guilty finding on several counts of the indictment that had been stricken demonstrated that it had failed to consider each count separately and thus required a new trial is also without merit.[7] The jury answered as to each count and was clearly instructed that it must determine guilt beyond a reasonable doubt on

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6 "Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject." *Michelson* v. *United States*, 335 U.S. 469, 480 (1948).

7 Counts of the indictment were separated for each alien application. The counts stricken were those as applied to particular applicants.

each count.[8] It did in fact acquit Kahan on two counts. There is neither ambiguity in the verdict rendered, *Glenn* v. *United States*, 420 F.2d 1323 (D.C. Cir. 1969), nor is the verdict an "inaccurate and insufficient hotchpotch. . . ." *United States* v. *DiMatteo*, 169 F.2d 798 (3d Cir. 1948). Where separate verdicts are given on each count pursuant to specific instructions to find guilt separately on each count, conviction on all counts is not necessarily negatived by error affecting only one or several of numerous counts. Here, where 67 counts were before the jury the error was, in the words of defense counsel at trial, merely an "oversight," properly corrected as to the stricken counts without affecting the validity of the remaining counts.

Newman challenges the court's finding that the government had proved by clear and convincing evidence that Inspector Piccirillo's in-court identification was based on a source independent of a wrongful showup. *United States* v. *Wade*, 388 U.S. 218 (1967); *see, e.g., United States ex rel. Rivera* v. *McKendrick*, —— F.2d —— (2d Cir., Feb. 15, 1973). Piccirillo, engaged in surveillance of Kahan, testified that while so occupied he had twice observed Newman meeting Kahan. On both occasions the meetings were in daylight, or bright night, and Piccirillo came within several feet of the defendants during the meetings. Each observation was approximately twenty minutes in duration. Notes taken at the time of the meetings indicate that Kahan had met a woman who stood about shoulder high to Kahan, was fair, stocky and had long reddish dyed hair —more black than red. The description fits Newman.

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8 "The Government's failure to establish beyond a reasonable doubt any one of the three elements of the crime of receiving an unlawful gratuity as to any count must result in Mr. Kahan's acquittal of that charge.

On the other hand if you find that the Government has established beyond a reasonable doubt each essential element as to a particular count, then you may convict Mr. Kahan of that particular count."

The unlawful showup occurred six months after the observation. Piccirillo looked in a room for several seconds where Newman was sitting and indicated that she was the woman he saw meet Kahan. While Piccirillo did not link Newman with a photograph of her given him prior to the meeting it appears that the photograph was old, black and white, that it showed only her face and that she had a different hairstyle. Apparently it is appellant's physical stature that is distinctive, a factor not clearly shown in the picture. Piccirillo had observed another woman and specifically found her not to be the woman in the photograph; he did not make a similar finding as to Newman. The finding of an absence of a taint from the showup is fully supported by the record.[9]

The court's limiting of impeachment by the defense of alien witnesses as to questions concerning prior convictions and a prior inconsistent statement was not error. As a general rule a witness' acts of misconduct are not admissible to impeach his credibility unless the acts result in a conviction. *United States* v. *Sposato*, 446 F.2d 779, 780-81 (1971). So far as the offer was of criminal activity as bearing on likelihood of lying solely because other criminal acts had been done, the limitation imposed was proper. *See United States* v. *Kahn and Teleprompter*, 472 F.2d 272, 279-80 (2d Cir. 1973). Here, the court's limitation, such as it was, was imposed only after twelve of the sixteen witnesses had been questioned as to their deliberate falsifying of statements on visa applications. Witnesses who testified subsequent to the limitation testified that their presence in the United States was illegal. So far as the facts indicated a motive to lie to curry favor with the government by law violators they were quite fully developed before the jury.

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9 *Cf. Neil* v. *Biggers*, 409 U.S. 188 (1972); *United States ex rel. Gonsales* v. *Zelker*, slip op. 2891 (2d Cir., April 17, 1973).

We find no error on Newman's appeal and affirm her conviction.

We reverse and remand for retrial as to Kahan.

MAXSFIELD, *Circuit Judge* (Concurring in Part and Dissenting in Part):

I concur in Judge Smith's thorough and thoughtful opinion except as to his conclusion that it was reversible error to have admitted into evidence Kahan's pretrial statement, made in support of his application for appointment of counsel pursuant to the Criminal Justice Act, that he was without funds. Since I disagree with this conclusion, I would affirm the judgment as to both defendants.

It is settled that an accused's self-incriminatory testimony, given at a pretrial hearing in support of his application for enforcement of his Fourth or Sixth Amendment rights, may not later be admitted against him at trial as part of the government's case. *Simmons* v. *United States*, 390 U.S. 377, 389-94 (1968); *United States* v. *Branker*, 418 F.2d 378, 380 (2d Cir. 1969).[1] To hold otherwise would be

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1 In *Simmons* the defendant, who was charged with armed robbery, moved to suppress the introduction at trial of a suitcase containing a gun holster and several items that had been taken from the bank at the time of the robbery as violative of his Fourth Amendment rights. Justice Harlan stated:

> "The only, or at least the most natural, way in which he could found standing to object to the admission of the suitcase was to testify that he was its owner. Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim. . . . Testimony of this kind, which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, must often be highly prejudicial to a defendant. This case again serves as an example, for Garrett's admitted ownership of a suitcase which only a few hours after the robbery was found to contain money wrappers taken from the victimized bank was undoubtedly a strong piece of evidence

to deter a defendant from the assertion of his lawful constitutional rights. In the words of Justice Harlan, speaking for a 6 to 2 majority in *Simmons*, *supra*, the accused would be "obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." Absent a rule barring the government's use on its direct case of the accused's self-incriminatory statements, he would be able to give essential testimony only at the risk that damaging admissions would then be used to convict him at trial.

But when an accused decides to use perjury or false statements as a means of claiming a right (to which he might not be entitled if he told the truth) he faces no such dilemma or Hobson's choice. The salutary rule of *Simmons*, as extended by *Branker* to the exercise of Sixth Amendment rights, was founded on the principle that an accused should not be deterred from telling the truth at a pretrial hearing even though it would involve admissions of an incriminating nature. No legitimate interest is protected by extending the rule to outright perjury or falsification. The latter should carry all of their normal sanctions, including the

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against him. Without his testimony, the Government might have found it hard to prove that he was the owner of the suitcase.

* * * * *

"In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of *his own testimony connecting himself with the seized evidence.*" (Emphasis added) 390 U.S. at 391, 393.

In *Branker* the defendant was convicted after a retrial of knowingly participating in a scheme to defraud the government by obtaining false tax refunds. At an indigency hearing held after the first trial in connection with his application to appeal *in forma pauperis* he admitted, after first denying that he had received for his personal use any of the refunds, that he had received small amounts out of refund checks cashed by him for others.

admission at trial of the accused's demonstrably false statements wherever they would otherwise be relevant.[2] It is unnecessary to grant him a license to falsify in order to protect his exercise of his pretrial constitutional rights.

Applying these principles here, Kahan's volunteered representation to the court, upon his application for appointed counsel, that he was indigent and had "no current funds" when he had in fact accumulated approximately $27,000 in four bank accounts over which he had exclusive control not only deceived the court but amounted to a false exculpatory statement. *United States* v. *McConney*, 329 F.2d 467, 470 (2d Cir. 1964).[3] The proof showed that, as-

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2 Normally the fact that a defendant may be prosecuted for perjury based on his willful giving of materially false testimony does not preclude the government from offering in evidence his prior false statements where they are relevant and probative with respect to issues, e.g., knowledge, intent, consciousness of guilt. As with all other prejudicial evidence offered by the government, the defendant is protected by obtaining from the court, out of the jury's presence, a preliminary ruling as to the falsity of the earlier statement and its relevance to the issues on trial, which was the course followed by Judge Motley. Indeed she further found that the prejudicial effect of Kahan's statement did not outweigh its probative value.

3 Kahan's pertinent statement to the court was as follows:

"The Court: Your name, sir?

"The Defendant: I am Norbert Kahan, sir.

"The Court: Have you an attorney?

"The Defendant: No, sir.

"The Court: Have you any money to hire an attorney?

"The Defendant: I do, sir, but it's blocked by my wife from whom I am divorced.

"The Court: Do you want a week to try and straighten that out?

"The Defendant: There is a suit coming up sometime early next year.

"The Court: We can't wait until next year.

"The Defendant: Then if it pleases the Court I would like to have the Court assign me an attorney.

"The Court: You have no current funds?

"The Defendant: I beg your pardon?

"The Court: You have no current funds at all?

"The Defendant: No, sir.

"The Court: Are you working?

suming he had spent nothing during the years 1970 and 1971, he had deposited more money in these accounts ($27,000) than his entire legitimate income ($25,000) as reported by him on his tax returns. Evidence to that effect was properly received as the basis for an inference that he received some of the money paid by non-resident aliens to Mrs. Newman to obtain Kahan's approval of their falsified applications for extension of the length of their stay in the United States.

It furthermore appears that, aside from Kahan's false statement to the court as to his finances, which covers but 2 ½ pages out of a total trial transcript in excess of 2,000 pages, the other evidence against him was overwhelming. See majority opinion, *supra* n.2. There was eye-witness testimony of meetings between Kahan and Mrs. Newman, from one of which he was seen to exit, take an envelope out of his pocket, remove money from the envelope and place the money in his wallet. Of 178 copies of INS Form I-539 (Alien's Application to Extend Time of Temporary Stay) found in Mrs. Newman's apartment, 155 had been

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"The Defendant: No, sir.

"The Court: I'm going to assign Mr. Jesse Berman at this point."

Following a conference in the courtroom with his new client regarding his "financial status," Mr. Berman reported to the court, on the basis of what Kahan had just told him, that Kahan "has no savings account in any bank in his own name. He had a joint account with his wife but since their divorce she has control of that account and he very strongly offers to reimburse the government should he be successful in his lawsuit against his ex-wife in the control of that account but at the present time he has no money."

Although Kahan contended at trial that he understood that the Totten savings accounts opened up by him belonged to his children, with himself merely the custodian, Judge Motley properly ruled that there was sufficient proof of falsity to warrant admission of Kahan's statement. It is beyond dispute that if Kahan, upon his arraignment, had disclosed the accounts rather than throw the court off the track by referring to the blocked account in dispute with his wife, denial of assignment of counsel under the Criminal Justice Act would have been mandated.

approved by Kahan. With six full-time inspectors and fourteen part-time inspectors working on such matters at the INS New York office, the chances are infinitesimal that if these 178 applications had been processed in the usual course of business, 87% of them would have been handled by Kahan. Furthermore, one of the forms found in Mrs. Newman's apartment bore Kahan's initials, from which it could reasonably be inferred that after approving it he had in violation of INS procedures returned it to Mrs. Newman. In addition there were Kahan's deposits during the period 1970-71 of approximately $27,000 in accounts controlled by him, which was more than his reported adjusted gross income during the period and could not be satisfactorily explained as coming from legitimate sources.

Assuming that Kahan, upon retrial, decides to take the witness stand in his own defense, his false statement to the district court as to his lack of money will probably be admissible to impeach his testimony, see *Harris* v. *New York*, 401 U.S. 222 (1971); *Walder* v. *United States*, 347 U.S. 62 (1954), or as a false exculpatory statement, even though, according to the majority, it was error to have admitted the statement as part of the government's direct case at the first trial. If, on the other hand, Kahan decides not to take the witness stand, the overwhelming case against him will stand virtually unrebutted. Under the circumstances, even assuming *arguendo* that the admission of his pretrial statement was error, it was harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250 (1967); *Schneble* v. *Florida*, 405 U.S. 427 (1972).

For the foregoing reasons I would affirm Kahan's conviction.

APPENDIX B

United States Court of Appeals for the Second Circuit

No. 72–2333

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORBERT NISAN KAHAN AND BERTHA NEWMAN A.K.A. BERTHA LIMO NEWMAN, DEFENDANTS

NORBERT NISAN KAHAN AND BERTHA NEWMAN, DEFENDANTS-APPELLANTS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of May one thousand nine-hundred and seventy-three.

Present: Hon. J. Joseph Smith, Hon. Wilfred Feinberg, Hon. Walter R. Mansfield, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to appellant Bertha Limo Newman but that the judgment as to

appellant Norbert Nisan Kahan be and it hereby is reversed and that the action as to appellant Kahan be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk.

APPENDIX C

United States Court of Appeals for the Second Circuit

Dockets Nos. 72–2333, 73–1012

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORBERT NISAN KAHAN AND BERTHA NEWMAN, DEFENDANTS-APPELLANTS

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the ninth day of July one thousand nine hundred and seventy-three.

Present: Hon. J. Joseph Smith, Hon. Wilfred Feinberg, Hon. Walter R. Mansfield, Circuit Judges.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

United States Court of Appeals for the Second Circuit

Dockets Nos. 72–2333, 73–1012

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORBERT NISAN KAHAN AND BERTHA NEWMAN, DEFENDANTS-APPELLANTS

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 9th day of July, one thousand nine hundred and seventy-three.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, a poll of the judges in regular service having been taken at the request of such a judge, and there being no majority in favor thereof, upon consideration thereof, it is Ordered that said petition be and it hereby is denied.

Judges Friendly, Hays, and Mansfield dissent.

IRVING R. KAUFMAN,
Chief Judge.

U.S. GOVERNMENT PRINTING OFFICE : 1973 O - 520-250